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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GREGG BREED, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B263705 (Los Angeles County Super. Ct. No. BC534150)

APPEAL from an order of the Superior Court for the County of Los Angeles. Richard Fruin, Judge. Affirmed.

Peter Law Group, Arnold P. Peter and Melinda D. Minoofar for Plaintiff and Appellant.

Ballard Rosenberg Golper & Savitt, Linda B. Hurevitz, Christine T. Hoeffner and Rami A. Yomtov for Defendant and Respondent.

SUMMARY

Plaintiff Gregg Breed sued his former employer, the Los Angeles Unified School District (defendant or LAUSD), alleging his contract of employment as chief risk officer (CRO) was not renewed in violation of Labor Code section 1102.5.[1] Section 1102.5 is a "whistleblower" statute that prohibits retaliation against an employee who discloses information to a government or law enforcement agency, if the employee "has reasonable cause to believe" that the information discloses a violation of a state or federal statute, rule or regulation.

The trial court found plaintiff's complaint did not allege he had disclosed a violation of a state or federal law, rule or regulation, but merely that he had complained about policies he believed to be unwise or wasteful. The court also concluded plaintiff could not challenge defendant's court-approved settlements of minor students' sex abuse claims as a gift of public funds.

We affirm the trial court's judgment dismissing plaintiff's complaint.

FACTS

This case is an offshoot, of sorts, of the Miramonte Elementary School sex abuse litigation. We recount the facts as alleged in plaintiff's complaint.

Plaintiff was selected as CRO for defendant in 2012. The parties entered into a "senior management employment agreement" for the period April 9, 2012 through June 30, 2013. The agreement provided that if defendant decided not to reemploy plaintiff upon expiration of the term, defendant would notify him at least 45 days before expiration of the term;

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1 Further statutory references are to the Labor Code.

otherwise, plaintiff would be deemed reemployed in accordance with the Education Code.

Plaintiff had worked in the risk management field for over 30 years. He has extensive experience settling and negotiating high profile cases, and has personally selected outside counsel and managed complex litigation cases.

Within two weeks of his hiring, plaintiff began to attend defense meetings concerning the Miramonte litigation. Plaintiff "raised questions about the Miramonte plaintiffs' claims and how [defendant] would 'value' these cases." Plaintiff proposed an "early resolution and structured settlement process," and on June 5, 2012, the LAUSD Board approved the process plaintiff proposed.

A central feature of the early resolution process was a "fact sheet" to be completed by each Miramonte claimant. A team including plaintiff "would assign a rating to the claim based on the level of severity of the alleged abuse and credible documentation supporting" the claim. Plaintiff would take the team's recommendation to an executive committee (Gregory McNair, who was defendant's chief business and compliance counsel; Thomas Delaney of Sedgwick, LLP, defendant's outside counsel; and plaintiff). The executive committee "was required to sign off on a jointly agreed settlement value for each Miramonte plaintiff. The equitable idea behind this approach . . . was that available settlement funds should be apportioned, based on the level of exposure and injury experienced by each claimant."

After he was hired in April 2012, plaintiff "immediately began to notice corruption and cronyism" in the Office of General Counsel. That office and the CRO's office had developed an approved list of outside counsel for litigation (the defense panel)

"to ensure that any retained outside counsel are selected on the basis of experience, professional reputation and proven results." But Mr. McNair, under direction of General Counsel David Holmquist, "selected outside counsel based on his personal relationships rather than using the Defense Panel criteria," which required experience in sexual assault and molestation cases. Mr. McNair hired Mr. Delaney of the Sedgwick firm ("who had once employed McNair"), and Sean Andrade of Baute, Crochetiere and Maloney LLP (Mr. Baute "was a law school classmate of McNair's"). "Neither firm had experience in the area of sexual assault and molestation cases."

Attorneys on the defense panel "with relevant experience in this area of law charge in the area of $175 hour," but Mr. Delaney and Mr. Andrade were paid their normal rates of $455 and $390 an hour respectively. One example of defendant's "gross mismanagement of public funds" was that defendant hired qualified attorneys charging $175 an hour "to teach a training session to Delaney, Andrade and others about sexual assault and molestation cases."

"[S]tarting in or about early October 2012," plaintiff complained to Mr. McNair and to Chief Operating Officer Enrique Boull't about the selection of Messrs. Delaney and Andrade. "In or about October 2012 after raising his complaints and alarms, in the first of a series of retaliatory actions . . . , Plaintiff received an outrageously negative and patently fabricated personnel evaluation" by Mr. Boull't. In addition, plaintiff "began to be excluded from critical meetings within his area of responsibility." "[S]tarting on or about October 2012, Plaintiff repeatedly communicated his concerns about McNair's

handling of the Miramonte Cases to 'Boull't'," but defendant refused to conduct an investigation.

On or about February 14, 2013, "[r]ather than employ the Board-approved Early Resolution Process originally proposed by Plaintiff," Mr. McNair barred plaintiff "from the critical final mediation session with Miramonte plaintiff attorney Raymond Boucher," and "settled a large group of Miramonte cases at a flat rate of $470,000 for each claimant, contrary to the individualized approach" plaintiff had developed.

After the mediation, plaintiff learned there had been no review of some of the Miramonte claimants' fact sheets before the settlement. This "violated the LAUSD's Board-approved process to vet each litigant and ensure both that taxpayer dollars were spent properly and victims were adequately compensated, but not over compensated."

Plaintiff's examination of the fact sheets revealed "numerous errors such as lack of signatures . . . , lack of Social Security numbers, the wrong names (of litigants) when compared to the school classroom rosters, lack of supporting documents, among the defects. Plaintiff also found numerous inequities and unintended results." Several examples of claimants who were allocated $470,000 include a claimant who did not attend classes with the abuser and was not in the after school program; a female claimant who was touched just once on the shoulder by the accused teacher; three claimants who made allegations against an accused teacher "as to whom LAUSD had no prior notice of sexual abuse" and was "likely shielded from liability because no negligence on the LAUSD's part occurred"; and two claimants who "were never touched and received awards based on factors

such as 'being angry' and 'not wanting to go on amusement park rides.' "

"On or about April 9, 2013, Plaintiff was informed by Boull't that his employment contract would not be renewed." Plaintiff believes this was "in retaliation to Plaintiff's unveiling of numerous errors on behalf of Defendants," and that "Boull't, McNair, and Holmquist conspired to drive him out of his position as CRO."

Plaintiff filed this lawsuit on January 23, 2014, alleging 10 causes of action. The trial court sustained defendant's demurrer to his first amended complaint with leave to amend, and plaintiff filed the operative second amended complaint on December 23, 2014.

In addition to the facts described above, the second amended complaint (like the first amended complaint) alleged, on information and belief, that Mr. McNair excluded plaintiff from the February 2013 mediation "because he knew that Plaintiff would object to this non-specific and fiscally irresponsible approach, and bring the matter to the attention of the LAUSD Board out of concern that McNair was engaging in improper governmental conduct, making a gift of public funds as to certain of the Miramonte claimants and subverting the Board's direction."

Plaintiff also alleged that Mr. Holmquist told the public the settlements would be paid by third party insurance companies, a statement "designed to diminish the shock, should it ever be discovered that students who never even encountered the abuser were handed $470,000 because of a settlement strategy developed by one of Holmquist's subordinates."

Because outside counsel had "little to no experience in the area of sexual assault and molestation cases, the insurance companies were never informed of the date of the final mediation and were not allowed to participate in the mediation or to approve the settlements as required by the insurance agreements." (Italics omitted.) As a result, the insurance companies have taken the position they will not indemnify defendant or fund the settlement. One carrier has sued defendant and another has issued a reservation of rights letter regarding lack of notice of the decision to settle. "As a result of rejecting Plaintiff's advice to the contrary, it is likely that LAUSD will be solely liable for the $30 million committed in mediation and an additional $30 million allocated for the remaining Miramonte cases."

Plaintiff alleged that "[d]ue to cronyism, corruption and mismanagement," defendant's current insurers refused to submit bids for insurance coverage for the 2013-2014 school year. "Despite the outside law firms' carelessness that has caused the LAUSD to lose insurance coverage for both the Miramonte cases and for all claims in the future, McNair, in another example of egregious cronyism, selected the same attorney (Andrade) to represent LAUSD in litigation filed by one of the insurance companies . . . where his own actions and decisions will be the central legal issue adjudicated." (Italics omitted.)

In his cause of action for retaliation under section 1102.5, plaintiff incorporated the allegations described above and alleged that, "as stated throughout this Complaint, [he] repeatedly communicated improper government activities that violated of [*sic*] Article XVI, Section 6 of the California Constitution, prohibiting a gift of public funds . . . ."

Defendant filed a demurrer to the second amended complaint. This time, the trial court sustained the demurrer without leave to amend. The court observed that plaintiff had failed to allege facts curing the defect in his first amended complaint, and stated: "Plaintiff has not amended his pleading to demonstrate that he actually communicated to defendant LAUSD a violation of Art. XVI, § 6 of the California Constitution."

The court explained that plaintiff's retaliation claim was premised on his complaints about (1) the hiring of unqualified and incompetent outside counsel to represent the LAUSD in the Miramonte litigation, and (2) the settlement of several Miramonte lawsuits or claims by payment of excessive monetary amounts. The court concluded neither of those allegations related to violation of a state or federal law, rule or regulation. "[C]omplaints about policies that an employee believes to be unwise or wasteful, etc. don't qualify as protected conduct. Re Plaintiff's allegations complaints [*sic*] about settling the Miramonte lawsuits for excessive amounts, the Court agrees with moving party's argument to the effect that under the circumstances (i.e., the settlements were entered in the context of minor's compromises), plaintiff cannot challenge the settlements as a 'gift of public funds.' "

Judgment was entered in defendant's favor on February 27, 2015, and this timely appeal followed.

DISCUSSION

1. The Standard of Review

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but

not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) Plaintiff has the burden to show a reasonable possibility the complaint can be amended to state a cause of action. (*Ibid.*)

2. This Case

Plaintiff tells us in his reply brief that he only appeals the sustaining of the demurrer to one cause of action in the second amended complaint for retaliation under section 1102.5.

At the time of the events at issue, former subdivision (b) of section 1102.5 (section 1102.5(b)) prohibited an employer from retaliating against an employee "for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation . . . ." (Former § 1102.5(b).)[2] "A report made by an employee of a

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[2] Section 1102.5(b) was amended and now prohibits retaliation "against an employee for disclosing information . . . to a government or law enforcement agency, [or] to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local,

government agency to his employer is a disclosure of information to a government or law enforcement agency pursuant to former section 1102.5(b)." (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548.) As with other retaliation claims, to state a prima facie case of retaliation under section 1102.5(b), "a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384 (*Patten*).) Here plaintiff has not alleged he engaged in the activity protected by section 1102.5(b): disclosure of conduct he reasonable believed was a violation of state or federal law.

Plaintiff argues, and alleged in his complaint, that he complained to his superiors "about the manner in which the Miramonte Cases were managed, including the lump sum payments on meritless or marginal claims." And plaintiff points out that, "*[i]n both the FAC and SAC*, [plaintiff] stated his reasonable belief that the District's acts and omissions represented a violation of the California Constitution." (Italics added.) But as the trial court pointed out, plaintiff does *not* allege that, *when he complained* about mismanagement and lump sum payments on marginal claims, he told his superiors that he believed their actions violated the constitution (or any other state or federal law). Because he did not do so, he cannot now contend he engaged in activity protected by section 1102.5.

The first applicable principle is stated in *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832. "Disclosures of a policy that the employee reasonably believes

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state, or federal rule or regulation . . . ." (§ 1102.5, subd. (b).) The changes are not pertinent to this case.

violates a statute or regulation are protected disclosures, whether or not the existence of an actual violation or the wisdom of the policy are debatable." (*Id.* at p. 854, italics omitted.) On the other hand, "the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like," are *not* protected disclosures. (*Id.* at pp. 852-853.) In other words, alleged violations of statutes or regulations are protected, while policies that are challenged *only* as unwise or economically wasteful are not. (See *id.* at p. 852 ["it is . . . the nature of the communication that determines whether it is covered," citing *Patten, supra,* 134 Cal.App.4th at pp. 1384-1386 as "differentiating under [section 1102.5(b)] disclosures encompassing only internal personnel matters from disclosures where employee had reasonable cause to believe the information disclosed a violation of a state or federal statute"].)

We see in the second amended complaint no allegation that plaintiff conveyed to defendant any belief, reasonable or otherwise, that defendant's handling of the Miramonte settlement amounted to a gift of public funds in violation of the California Constitution. (This is so despite the trial court's warning, when it sustained defendant's demurrer to the first amended complaint with leave to amend, that allegations of management disagreements do not show a section 1102.5 violation, and that allegations suggesting plaintiff communicated violations of the clause on gifts of public funds "are too unspecific to satisfy either the protected activity element or to establish a nexus between that element and the alleged adverse employment actions.") We see no basis upon which to disagree with the trial court.

Nor do we see how plaintiff could have entertained a reasonable belief, then or now, that the matters he complained of disclosed a violation of the constitutional provision prohibiting gifts of public funds. *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431 (*Jordan*) explains the principle: " 'It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition. [Citation.]' [Citation.]" (*Id.* at p. 450.) Further, "[t]he settlement of a good faith dispute between the state and a private party is an appropriate use of public funds and not a gift because the relinquishment of a colorable legal claim in return for settlement funds is good consideration and establishes a valid public purpose. [Citation.] The compromise of a wholly invalid claim, however, is inadequate consideration and the expenditure of public funds for such a claim serves no public purpose and violates the gift clause." (*Ibid.*; *id.* at p. 451 ["Where the state's maximum exposure [was] established by a judgment, a payment of more than that maximum in settlement of the dispute, without independent consideration, is a gift of public funds."].)

Here, plaintiff contends "there can be no question that [defendant's] decision to settle meritless cases constituted a violation" of the constitutional prohibition on gifts of public funds. Putting aside plaintiff's failure to so advise his superiors at the time, we point out that the complaint itself alleges that at the mediation, defendant "settled a large group of Miramonte cases at a flat rate of $470,000 for each claimant, contrary to the individualized approach" plaintiff had developed. It is not the

province of a court to require a government agency to follow an "individualized approach" rather than a flat rate approach to dispose of multiple claims. Even if this results in one or more excessive payments among the more than 60 claims settled – all pursuant to minors' compromises approved by the Superior Court – these circumstances cannot reasonably be thought to constitute "[t]he compromise of a wholly invalid claim" within the meaning of the principle explained in *Jordan*.

In sum, plaintiff did not engage in protected activity within the meaning of section 1102.5(b), because his complaints to his superiors about the selection of outside counsel and his concerns about Mr. McNair's handling of the Miramonte cases – as alleged in his second amended complaint – did not reveal a belief on his part that defendant was engaging in conduct that violated the California Constitution or any other state or federal statute. Nor does he tell us how he could amend the complaint to cure that defect. The trial court did not err in dismissing his complaint.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.